Office-Supreme Court, U.S.
FILED
FEB 5 1983
ALEXANDER L. STEVAS,
CLERK

82-1361

No. ———

IN THE

Supreme Court of the United States

OCTOBER 1982 TERM

JON CARY MAIER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1983—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals violated the "clearly erroneous" standard of Fed.R.Civ.P. 52(a) when, based only on direct testimony and contrary to evidence adduced via cross examination, it overturned the factual finding by the Magistrate and the District Court that Defendant's truck was not impounded pursuant to standard Minneapolis Police procedures.

II. Whether a post impoundment inventory search of a vehicle which did not comport with the standard impoundment procedures of the local police is violative of the Fourth Amendment.

III. Whether a full, nonconsensual, warrantless search of an illegally parked camper-truck is justified when there is present an unlicensed responsible adult who can arrange for removal of the camper-truck or its contents, or who can otherwise relieve police of liability for property claims.

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QUESTIONS PRESENTED FOR REVIEW

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REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 691 F.2d 421 (8th Cir. 1982) and is attached hereto as Appendix 1. The Order of the United States District Court, District of Minnesota, 3-81CR.83, is unreported, but attached hereto as Appendix 2. The Report and Recommendation of the United States Magistrate is attached hereto as Appendix 3.

JURISDICTIONAL STATEMENT

On October 27, 1982, the United States Court of Appeals for the Eighth Circuit filed its opinion in the instant case reversing the District Court's Order suppressing evidence. On December 7, 1982, the United States Court of Appeals for the Eighth Circuit entered its Order denying Defendant's Petition for Rehearing. 28 U.S.C. Section 1254 confers on this Court jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari.

RELEVANT CONSTITUTIONAL PROVISIONS AND REGULATIONS

(1) U.S. CONST. Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

(2) Fed.R.Civ.P. 52(a):

Findings by the Court:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

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PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

On September 10, 1981, at approximately 2:00 a.m., Minneapolis police officers Myron Rognlie and Michael Carey received a call to check a "slumper," or party sleeping in a vehicle parked at 330 East 46th Street, Minneapolis, Minnesota (T./[1] 5-6). When they arrived the officers found a pickup truck parked with its right-hand front and rear wheels on the sidewalk (T. 6). The box of this pickup was covered by a "topper," or shell camper, so that the rear portion of the truck was fully enclosed (T. 11). This entire rear portion was divided into two separate, locked com-

[1] "T" refers to transcript of hearing of pretrial motions held before Magistrate Brian P. Short on October 26, 1981.

partments. The normal tail section of the pickup was covered by a large sheet of plywood, approximately 4 feet by 8 feet in dimension (T. 13, 15). This piece of plywood rendered the normal tail section of the truck an enclosed, concealed box twelve to eighteen inches in height (T. 33). In order to gain access to this concealed compartment, it was necessary to unlock the tailgate and pull it down (T. 14). Secondly, the fiberglass "shell camper" attached on top of the tail section created an upper compartment which reached in height to the top of the cab (T. 11). This camper top had a window at the back (T. 29) and could be opened by unlocking and flipping up its hinged back section (T. 13-14). The large sheet of plywood board served as the floor of this upper locked compartment (T. 14).

When the officers approached the truck they found the Petitioner, Mr. Maier, asleep in the driver's seat (T. 6). The officers woke Mr. Maier, and in response to their questions he identified himself and gave his address and date of birth (T. 6). Officer Carey ran a driver's license check and a warrant check (T. 6). He discovered that Mr. Maier was clear of any warrants but that his driver's license was under suspension (T. 7). The officers also determined that the truck was not stolen (T. 26, Magistrate's Findings of Fact No. 6).

The officers instructed Mr. Maier to get out of the cab of the truck, and told him that because his license was under suspension they were not going to let him drive the vehicle away (T. 7). They did not afford Mr. Maier the opportunity to make arrangements to have the vehicle removed by calling a licensed driver who could remove it from its illegally parked location (T. 32). Officer Rognlie

frisked Mr. Maier for weapons, found none, and instructed him to leave the scene (T. 7, 19; Magistrate's Finding No. 7). The officers took the keys for the truck, gave Mr. Maier his remaining keys, and sent him on his way (T. 7). Throughout this incident, Mr. Maier made no threatening remarks or jestures toward the officers (T. 19), and the officers never saw any movement in the vehicle which would have suggested the presence of someone else (T. 34). While the officers could have ticketed the truck and left it where it was, (T. 22-23), they decided instead to search the vehicle (T. 8). The officers never issued a citation on the truck for illegal parking (T. 22).

After Mr. Maier began walking away from the scene, the officers commenced their search (T. 8). Mr. Maier had not consented to this procedure, and the officers did not afford him the option of relieving the police department from liability for claims (T. 31-32). Officer Rognlie entered and searched the unlocked cab compartment of the vehicle. He saw nothing in plain view which appeared to be contraband (T. 30). He did discover in the cab a leather pouch, and he yelled down the street to Mr. Maier, "Is this your purse?" (T. 21) Mr. Maier called back that he had no "purse" (T. 21). Officer Rognlie then found a second pouch which contained large amounts of currency (T. 9). After finding this money, he ran after Mr. Maier and found him down the street (T. 9). Again, Mr. Maier denied ownership of any "purse" (T. 21), and stated that he had been using the truck for the previous five months, but that it belonged to a friend (T. 10). Officer Rognlie ordered Mr. Maier to accompany him back to the truck, and the two men walked back to the scene (T. 10).

Officer Rognlie immediately placed Mr. Maier in the

rear of the squad car and returned to his partner (T. 11). Meanwhile. Officer Carey had already moved to the rear of the truck. Looking through the window of the camper top, he saw only some sleeping bags and what appeared to be a rake and a cyclone fence (T. 29). Nonetheless, without consent, exigent circumstances or a search warrant, Officer Carey unlocked and opened the camper top compartment with a key he had found on the front seat of the truck (Affidavit in Support of Search Warrant; T. 11).

Upon opening the camper top, Officer Carey asked Officer Rognlie to "come over here" (T. 11). Officer Rognlie did so, and later testified that he detected the smell of what he believed was marijuana coming from the rear of the vehicle (T. 12). However, Officer Rognlie admitted in his testimony that he has never served on the Minneapolis Narcotics Squad and has no training in narcotics (T. 27-28), and he could not describe the smell of unburned marijuana or articulate why the smell he noticed in the truck was that of unburned marijuana (T. 28; Magistrate's Finding No. 19). After the warrantless search of the camper top portion of the truck, the officers unlocked the truck's tailgate so as to gain access to the concealed compartment below the sheet of plywood (T. 12-13; Magistrate's Finding No. 19; Affidavit in Support of Application for Search Warrant). Under the sheet of plywood, the officers found several sealed, opaque, plastic bags, one of which Officer Rognlie squeezed (T. 13, 15). The officers then returned to their squad car, advised Mr. Maier that he was under arrest for "probable cause, narcotics," and called for a narcotics investigator (Magistrate's Finding No. 20).

When Sgt. John J. Boulger, a Minneapolis Narcotics Officer, arrived, Officers Rognlie and Carey explained to

him what they had found and how they had come upon it (T. 41; Magistrate's Finding No. 21). Sgt. Boulger prepared an affidavit in support of an application for a search warrant based solely on the information received from Officers Rognlie and Carey (T. 42; Magistrate's Finding No. 22). The search warrant was issued by Hennepin County Municipal Court Judge Kenneth Gill, and a search pursuant to this warrant revealed a quantity of suspected marijuana in the plastic bags within the camper compartment of the vehicle. (T. 39; Magistrate's Finding No. 24). On the same day, Mr. Maier was charged by complaint with possession with intent to distribute marijuana in violation of 21 U.S.C. Section 841. Federal jurisdiction in the United States District Court for the District of Minnesota was based on 18 U.S.C. Section 3231 and Fed.R.Crim.P. 18.

On October 28, 1981, the Defendant brought on for hearing before Magistrate Brian Short a motion to suppress all evidence obtained as a result of the search and seizure of the vehicle. During the hearing on this motion, Officer Rognlie claimed for the first time that the rear portion of the truck had been searched out of a concern for his personal safety. (T. 11). In the report which he prepared the night of the incident, Officer Rognlie made no mention of this alleged concern for police protection (T. 18), and he made no supplementary report which spoke of police safety as grounds for searching the rear of the vehicle (T. 34). Because the space under the plywood sheet was only twelve to eighteen inches in height, nothing unusual had been observed during the course of the search, the defendant was not carrying any weapons, and the truck was not stolen. the Magistrate concluded that Officer Rognlie's alleged fear

for his safety was not reasonable (Magistrate's Report, page 5).

Officer Rognlie also claimed at the hearing that the search was an inventory search after impoundment conducted in accordance with normal police procedure (T. 8), and that the truck was impounded because it was parked on the sidewalk (T. 22). This claim was contradicted by the police report, which set forth that the rationale for impounding was the finding of the alleged marijuana (T. 23). Further, Officer Rognlie's cross examination revealed that, contrary to police regulations: the impound report was not completed (T. 21) and/or filed (T. 22); no citation was issued for the illegal parking which formed the alleged basis for the impound (T. 22-23); he had no knowledge of the standards for impounding a vehicle (T. 24) or the standards for not impounding a vehicle (T. 25); the police inventory form regarding the contents of the vehicle had not been completed (T. 26-27); Minneapolis Police Form 6007, otherwise known as a tow-sheet, was not completed prior to the impounding of the vehicle (T. 44); the vehicle identification number was not checked through the Police Auto Unit prior to impounding (T. 26, 44); and Mr. Maier was not afforded the opportunity to provide for the prompt removal of the vehicle before the officers commenced searching it (T. 32, 41).

After hearing the testimony of Officer Rognlie and Sgt. Boulger, the Magistrate concluded that the established Minneapolis Police Department procedures for impoundment of a vehicle had not been followed in the instant case (Magistrate's Finding No. 9), and recommended that the trial court grant Defendant's motion for an Order suppressing certain physical evidence, including all of the al-

leged marijuana found by the police (*See* Appendix 3, Magistrate's Report and Recommendation.) The Government objected to the Magistrate's findings that standard procedures had not been followed, that Officer Rognlie's alleged fear for police safety was unreasonable, and that the officers' belief that they detected the smell of unburned marijuana was unreasonable. (Government's Memorandum of Objections to the Magistrate's Report and Recommendations).

The district court conducted a *de novo* review pursuant to 28 U.S.C. Section 636(b) (1) and embraced all but one of the Magistrate's findings. Specifically, the court concluded that established procedures for impoundment of a vehicle had not been followed and that Officer Rognlie's alleged fear for his safety was not reasonable (*see* Appendix 2). The Court accepted the Magistrate's recommendation to suppress the physical evidence seized pursuant to the search of the vehicle. District Court Judge Alsop found no facts in the instant case to adequately distinguish it from *United States v. Wilson*, 636 F.2d 1161 (8th Cir. 1980), in which the Eighth Circuit Court of Appeals held that "[t]he routine search of a locked automobile trunk is unreasonable under the Fourth Amendment." 636 F.2d at 1165. (*See* Appendix 2, p. 2.)

On appeal, the United States Court of Appeals for the Eight Circuit reversed and remanded, *United States v. Maier*, 691 F.2d 421 (8th Cir. 1982), concluding that the facts in the instant case were quite different from those presented in *Wilson*. *Id.* at 423. Moreover, in the court of appeals' view, "the record demonstrates that the initiation of the search into the vehicle was in conformity with the usual practice for inventory searches of a vehicle to be

impounded," *Id.* at 424-25 n. 2, so that the warrantless search was justified under *South Dakota v. Opperman*, 428 U.S. 364 (1967). It is from this decision of the court of appeals that the instant petition arises.

ARGUMENT

I.

THE COURT OF APPEALS VIOLATED THE CLEARLY ERRONEOUS STANDARD OF FED. R. CIV. P. 52(a) WHEN, BASED ONLY ON DIRECT TESTIMONY AND CONTRARY TO EVIDENCE ADDUCED VIA CROSS EXAMINATION, IT OVERTURNED THE FINDING BY THE MAGISTRATE AND DISTRICT COURT THAT THE MINNEAPOLIS POLICE IMPOUNDMENT PROCEDURES WERE NOT FOLLOWED IN THE INSTANT CASE.

In recommending the suppression of the physical evidence seized pursuant to the search of the truck driven by Mr. Maier, Magistrate Brian Short made a factual finding that the established Minneapolis Police Department procedures for impoundment of a vehicle had not been followed. Magistrate's Finding No. 9. After *de novo* review, the district court adopted this finding. *See* Appendix 2. In reversing the decision of the district court, the United States Court of Appeals for the Eighth Circuit "disagreed" with this factual finding:

> Although Maier argues that the police did not comply with requirements of the Minneapolis ordinances for an inventory search, and the magistrate made findings consistent with Maier's contention, *we disagree with that conclusion.* . . . [T]he record demonstrates that the initiation of the search into the vehicle was

> in conformity with the usual practice for inventory searches of a vehicle to be impounded.

United States v. Maier, 691 F.2d 421, 424-25 n. 2 (8th Cir. 1982) (emphasis added). Interpreting *South Dakota v. Opperman*, 428 U.S. 364 (1976), the Eighth Circuit correctly concluded that "once a vehicle is seized and *legitimately taken into police custody*, the *routine* practice of securing and inventorying its contents is justified . . . ." 691 F.2d at 423 (emphasis added). By setting aside the finding of the Magistrate and district court that standard impoundment procedures had not been followed, the court of appeals was able to reconcile the search of the vehicle in the instant case with its reading of *Opperman*. The Eighth Circuit concluded that "*we are satisfied* from our examination of the record that the police entered the locked camper while conducting an appropriate inventory search," 691 F.2d at 423 n. 1 (emphasis added), and supported this conclusion by including in its opinion a lengthy quotation from the direct testimony of Officer Rognlie. *Id.* at 424-25 n. 2.

A court of appeals is not empowered to overturn factual findings simply because it "disagrees" with the trial court, or because it is "satisfied" from its own examination of the record that there is evidence supporting a conclusion contrary to that reached by the trial court.

According to Rule 52(a) of the Federal Rules:

> Findings of fact [by a federal district court] shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. Fed.R.Civ.P. 52(a).

Rule 52(a) has been extended to measure appellate review applicable to a trial judge's factual determination in a criminal case. *United States v. Hughes*, 635 F.2d 449, 453 (5th Cir. 1981); *Washington v. Watkins*, 655 F.2d 1346, 1353 (5th Cir. 1981) *cert. denied* 102 S.Ct. 2021 (1982); *United States v. Dochterman*, 630 F.2d 652, 653 (8th Cir. 1980); *United States v. Johnson*, 570 F.2d 836, 838 (8th Cir. 1978). This rule does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. *Pullman-Standard v. Swint*, 102 S.Ct. 1781 (1982). Nor does the rule divide facts into categories. *Id.* A trial court's findings with respect to police officers' conduct and adherence to regulations are factual findings to which the "clearly erroneous" standard applies for purposes of review. *See, Boscarino v. Nelson*, 518 F.2d 879 (7th Cir. 1975); *Jacobs v. City of New Orleans*, 484 F.2d 24 (5th Cir. 1973).

As this Court long ago established, the dictates of Rule 52(a) that findings of fact not be set aside unless clearly erroneous and that due regard be given to the opportunity of the trial court to judge of the credibility of witnesses, require that the appellate court make allowances for the advantages possessed by the trial court in appraising the significance of conflicting testimony. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949), *rev'd in part on other grounds*, 339 U.S. 605 (1950). Where there is evidence which would support either of two conflicting conclusions, but the trial court has decided to weigh evidence more heavily for defendants, such a choice between two permissible views of the weight of the evi-

dence is not "clearly erroneous." *United States v. Yellow Cab Company*, 338 U.S. 338 (1949); *Pickens-Bond Const. Co. v. United Broth. of Carpenters and Joiners of America, Local 690*, 586 F.2d 1234 (8th Cir. 1978); *accord, Booker v. Special School Dist. No. 1, Minneapolis, Minn.*, 585 F.2d 347, *cert. denied* 443 U.S. 915 (8th Cir. 1978); *Sam Miller Bag Co. v. Burlington Northern, Inc.*, 641 F.2d 607 (8th Cir. 1981). This principle reflects an appellate court's obligation to construe the evidence in a light most favorable to the appellee in determining whether the district court's findings were clearly erroneous. *United Barge Co. v. Notre Dame Fleeting & Towing Service, Inc.*, 568 F.2d 599 (8th Cir. 1978); *accord, Kansas City Stockyards Co. of Maine v. Anderson*, 199 F.2d 91 (8th Cir. 1952); *Southern Arizona York Refrigeration Co. v. Bush Mfg. Co.*, 361 F.2d 336 (9th Cir. 1966).

The Court of Appeals for the Eighth Circuit itself has noted that a court of appeals must accept the factual findings of a trial court unless these findings are clearly erroneous, based upon a review of the *entire record. Layne-Minnesota p.r., Inc. v. Singer Co.*, 574 F.2d 429 (8th Cir. 1978). Nevertheless, without even citing the conflicting "substantial evidence" within the forty-eight page record on which the Magistrate and district court had relied, the Eighth Circuit overturned their mutual finding that the officers had not followed established Minneapolis Police Department impoundment procedures. The Eight Circuit did not assert that the finding was clearly erroneous, or that the court was left with the definite and firm conviction that a mistake had been committed by the trial court. *See, e.g., International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir.), *cert. denied* 449

U.S. 1063 (1980); *Jackson v. U.S. Steel Corp.*, 624 F.2d 436 (3rd Cir. 1980); *Ferrero v. United States*, 603 F.2d 510 (5th Cir. 1979). Rather, the Eighth Circuit simply "disagreed" with the trial court's conclusion. 691 F.2d at 424 n. 2.

It is not a function of a court of appeals to decide factual issues *de novo. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). In *Norm Thompson Outfitters, Inc. v. General Motors Corp.*, 448 F.2d 1293 (9th Cir. 1971), the Ninth Circuit noted

> the severe limitations imposed on an appellate court in reviewing findings of fact . . . . It is not our function to reevaluate the evidence below . . . . Our task, rather, is to determine *if there exists evidence of substance* to support the findings of fact of the trial court . . . .

Id. at 1294-95 (emphasis added). In the instant case, the forty-eight page record of the hearing before Magistrate Short is replete with evidence which supports the finding by the Magistrate and district court. While the Eighth Circuit pretended that Officer Rognlie's testimony established that normal police procedure had been followed in impounding the truck, on cross examination he admitted he did not know what the police standards were for determining when to impound a vehicle (T. 24) or when *not* to impound (T. 25), or even what procedures should be followed before ordering an impound (T. 25).

Had Officer Ronglie been familiar with the Minneapolis Police Department Manual's standards for impounding and not impounding vehicles, he would have known that the vehicle driven by Mr. Maier should not have been impounded. *See* the 6-800 Series of the Manual which ad-

dresses impound procedures and was introduced as Government's Exhibit 1.

As the record and the Magistrate's Findings of Fact reflect, the officers were informed that Mr. Maier had been using his friend's truck for the previous five months (T. 10), Mr. Maier was clear of any warrants (T. 7), and the truck was not stolen (T. 26, Magistrate's Finding No. 6). Under the circumstances, proper police procedures dictated that Mr. Maier be afforded an opportunity to arrange for the prompt removal of the truck from its improperly parked location. Further, under *United States v. Wilson*, 636 F.2d 1161 (8th Cir. 1980), the police should have at least inquired whether Mr. Maier would relieve them of liability for claims, thus obviating the need for a search even *if* the vehicle was seized. *Id.* at 1165.

Officer Rognlie's cross examination also revealed that, contrary to the dictates of the Minneapolis Police Department Manual, the vehicle identification number was not checked through the Police Auto Unit prior to impounding (Government's Exhibit 1, section 6-803); Minneapolis Police Form 6007, otherwise known as a tow-sheet, was not completed prior to the impounding of the vehicle (*Id.*); the police inventory form (Form 6008) regarding the contents of the vehicle was never completed (Government's Exhibit 1. section 6-811); and an impound report had not been completed and/or filed as required (Government's Exhibit 1, section 6-806). Moreover, while Officer Rognlie claimed at one point that the truck was impounded because it was parked on the sidewalk (T. 22), he later admitted that the rationale for impounding which the officers set forth in the police report was the finding of the alleged marijuana (T. 23). He also admitted that no citation ever wes issued for illegal parking (T. 22-23).

Having had the opportunity to examine the relevant portion of the Minneapolis Police Department Manual and to hear the witnesses and judge their credibility, the Magistrate found that the established Minneapolis Police Department procedures for impoundment of a vehicle were not followed. Magistrate's Finding No. 9. The Government objected to this finding, but the district court, after its *de novo* review pursuant to 28 U.S.C. Section 636(b)(1), embraced the Magistrate's determination. While it is beyond question that "there exists evidence of substance to support the findings of fact of the trial court," *Norm Thompson Outfitters, Inc. v. General Motors Corp.*, 448 F.2d at 1294-95, the Eighth Circuit apparently ignored this evidence.

In *Cady v. Dombrowski*, 413 U.S. 433 (1973), as in the case at bar, the Court of Appeals for the Seventh Circuit simply overturned factual findings of a district court without any showing that said findings were clearly erroneous. *Dombrowski v. Cady*, 471 F.2d 280, 283 (7th Cir. 1972), *rev'd*, 413 U.S. 433 (1973). As this Court stated in reversing the Seventh Circuit's decision:

> While that Court [of Appeals] was obligated to exercise its independent judgment on the underlying constitutional issue presented by the facts of this case, it was not free on this record to disregard these findings of fact. . . . We believe that the Court of Appeals should have accepted, as did the state courts and the District Court, the findings with respect to Officer Weiss' specific motivation and the fact that the procedure he followed was "standard."

413 U.S. at 443.

The Eighth Circuit Court of Appeals should not be free simply to disregard the district court's findings of fact.

When, as in the instant case, there is evidence of substance to support a particular finding, the court of appeals is obligated to accept it. *Norm Thompson Outfitters, supra.* "If, on the other hand, such finding of fact is 'clearly erroneous,' it is the *duty* of this court [of appeals] *to so declare.*" *United States v. Munz,* 352 F.2d 196, 198 (9th Cir. 1965) (emphasis added). In the instant case, as in *Cady,* the court of appeals failed to do either.

It is apparent that the Eighth Circuit abused its authority in reviewing the district court's decision by failing to review the entire record before it, *Layne-Minnesota p.r., Inc. v. Singer Company,* 574 F.2d 429 (8th Cir. 1978), by failing to construe the evidence within the record in the light most favorable to the appellee, *United Barge Company v. Notre Dame Fleeting & Towing Service, Inc.,* 568 F.2d 599 (8th Cir. 1978), and by deciding the factual issues in this case *de novo, Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100 (1969). This Court should state with precision the duties and obligations of the courts of appeals with respect to their review of factual findings, and should reinstate the factual finding by the Magistrate and district court that the Minneapolis Police Department standard impoundment procedures were not followed in the instant case.

II.

UNDER *SOUTH DAKOTA V. OPPERMAN*, 428 U.S. 364 (1976), THE POLICE VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS BY CONDUCTING AN INVENTORY SEARCH OF HIS VEHICLE WHICH DID NOT COMPORT WITH THE STANDARD MINNEAPOLIS POLICE IMPOUNDMENT PROCEDURES.

In *South Dakota v. Opperman*, 428 U.S. 364 (1976), this Court made clear throughout its opinion that the law of that case applies only after a proper impoundment procedure has occurred in accordance with standard procedures in the local police department.

> At the officer's direction, the car door was then unlocked and, using a standard inventory form *pursuant to standard police procedures*, the officer inventoried the contents of the car . . . . 428 U.S. at 366 (emphasis added).
>
> * * *
>
> The decisions of this Court point unmistakenly to the conclusion reached by both federal and state courts that inventories *pursuant to standard police procedures* are reasonable. *Id.* at 372 (emphasis added).
>
> * * *
>
> In applying the reasonableness standard [of the Fourth Amendment] adopted by the Framers, this Court has consistently sustained police intrusions into automobiles *impounded or otherwise in lawful police custody* where the process is aimed at securing or protecting the car and its contents. *Id.* at 373 (emphasis added).
>
> * * *
>
> The Court carefully noted that the protective search [in *Cady v. Dombrowski*, 413 U.S. 433 (1973)] was

> carried out in accordance with *standard procedures* in the local police department, . . . a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function. *Id.* at 375 (emphasis in original; emphasis added).

Finally, Mr. Chief Justice Burger stated that:

> On this record we conclude that *in following standard police procedures,* . . . the conduct of the police was not "unreasonable" under the Fourth Amendment. *Id.* at 376 (emphasis added).

In his concurring opinion in *Opperman,* Mr. Justice Powell went to great lengths in stressing the importance of adherence to standard local police impoundment procedures:

> As the Court's opinion *emphasizes,* the search here was limited to an inventory of the unoccupied automobile and was conducted *strictly in accord with the regulations of the Vermillion Police Department.* 428 U.S. at 380 (emphasis added).
>
> * * *
>
> I agree with the Court that the Constitution permits *routine inventory searches* . . . . *Id.* (emphasis added).

In distinguishing proper inventory searches from those searches which require a warrant, Mr. Justice Powell noted:

> Inventory searches are *conducted in accordance with established police department rule or policy* and occur whenever an automobile is seized. *Id.* at 383 (emphasis added).

Strict adherence to local police impoundment procedures ensures the validity of warrantless inventory searches in a number of ways. If all inventory searches in a particular locale are conducted in strict compliance with established police department policy, there is little danger that any particular inventory search will in fact be conducted as a subterfuge for criminal investigation so as to avoid the more stringent requirements which apply to criminal investigative searches. *Opperman*, 428 U.S. at 376. Further, uniform adherence to proper department standards for inventory searches prevents hindsight from affecting the judicial evaluation of the reasonableness of any particular search. If a search has been conducted in strict accordance with standard police department procedures and yields incriminating evidence valuable in a subsequent criminal proceeding, there is little risk that the criminal court will be faced with a "hindsight justification" for the search. *Id.* at 383 (Powell, concurring). Finally, adherence to standard procedures tends to ensure that police officers will limit the scope of their inventory searches to the extent necessary to carry out their "community caretaking functions," *Opperman*, 428 U.S. at 375; *see, Cady v. Dombrowski*, 413 U.S. at 441, and it is these caretaking functions which justify warrantless intrusions by the police department. *Opperman*, 428 U.S. at 369-71.

In both federal and state courts, inventory searches have been invalidated because they were not conducted pursuant to standard impoundment procedures of the respective local police departments. *See, e.g., United States v. Hellman*, 556 F.2d 442, 444 (9th Cir. 1977); *United States v. Jackson*, 529 F.Supp. 1047, 1055 (D. Md. 1981); *State v. Jewell*, 338 So.2d 633, 639 (La. 1976); *State v. Hudson*,

390 A.2d 509, 511 (Me. 1978) (remanded to allow proof that inventory was carried out pursuant to standard local practice). In *Hellman*, the government contended that it was enough that an inventory practice was a routine part of impoundment procedures in most police departments throughout the country, but the Ninth Circuit disagreed:

> The fact that other police departments routinely follow such a practice may give support to the proposition that such a practice, if locally followed, is reasonable. It does not, however, render reasonable a search where the inventorying practice is not locally followed and the search, thus, is a departure from local practice. A locally followed practice gives some assurance that the particular car was not singled out for special searching attention.

United States v. Hellman, 556 F.2d at 444.

In the instant case, the Magistrate and district court properly concluded that the established Minneapolis Police Department procedures for impoundment of a vehicle were not followed. (Magistrate's Finding No. 9; *see* Appendices 1 and 2; *see* Argument I above.) While the court of appeals "disagreed" with this conclusion, *United States v. Maier*, 691 F.2d at 424 n. 2, its opinion suggests that the Eighth Circuit did not properly consider the cross examination of the officers or the specific Minneapolis Police Department policies (*see* Government's Exhibit 1) regarding impoundment. Under *Opperman*, the search of the truck driven by Mr. Maier violated the Fourth Amendment, and the evidence discovered in the course of that search should be suppressed.

III.

IN LIGHT OF THE PARTICULAR FACTS AND CIRCUMSTANCES OF THE CASE, A FULL, NONCONSENSUAL, WARRANTLESS SEARCH AFTER IMPOUND OF THE CAMPER-TRUCK WAS UNREASONABLE IN SCOPE AND UNCONSTITUTIONAL.

Even if this Court upholds the Eighth Circuit's conclusion that the search of the truck complied with standard Minneapolis police impoundment procedures, the search was unreasonable in scope and violated Mr. Maier's constitutional rights. "Unconstitutional searches cannot be constitutionalized by standardizing them as a part of normal police practices." *State v. Jewell*, 338 So.2d 633, 640 (La. 1976). While this Court has recognized the constitutionality of routine inventory searches conducted without a warrant, *United States v. Chadwick*, 433 U.S. 1, 10 n. 5 (1977); *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976), the Fourth Amendment remains relevant to this type of search. An inventory search must be reasonable within the meaning of the Fourth Amendment in light of the facts and circumstances of the particular case. *See South Dakota v. Opperman*, 428 U.S. at 375.

The Fourth Amendment's "reasonableness" standard requires that an inventory search be limited in scope. In *Opperman*, Mr. Chief Justice Burger stressed that adherence to standard police procedures ensures that intrusions are limited in scope to the extent necessary to carry out the caretaking function, 428 U.S. at 375, and specifically noted in validating the search of Opperman's vehicle that "[t]he inventory was not unreasonable in scope." *Id.* at 376 n. 10. In his concurring opinion, Mr. Justice Powell

also noted that "the *unrestrained* search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances." *Id.* at 379-80 (Powell, J., concurring; emphasis added); *accord, United States v. Edwards,* 577 F.2d 883, 893 (5th Cir.) (en banc) *cert. denied,* 439 U.S. 968 (1978); *United States v. Wilson,* 636 F.2d 1161, 1163 (8th Cir. 1980). *See also Terry v. Ohio,* 392 U.S.1, 18-19 (1968). To determine whether the scope of a search is reasonable, the governmental interests advanced by the inventory search must be weighed against the privacy interest invaded in light of the particular circumstances of the case. *United States vs. Wilson,* 636 F.2d at 1163.

Three governmental interests have been advanced to justify inventory searches:

(1) "The protection of the owner's property while it remains in police custody";

(2) "The protection of the police against claims or disputes over lost or stolen property"; and

(3) "The protection of the police from potential danger."

South Dakota v. Opperman, 428 U.S. at 369. In the instant case, the court of appeals concluded that the first of these interests justified a thorough search of the truck, including its locked camper/sleeper portion.

> After discovering the large amount of money in the cab, and in light of the absence of the owner, the need under *Opperman* for a reasonable police procedure for "protection of the owner's property" justified police in examining and making an inventory of the entire vehicle, including the locked camper, to ensure

> that any other valuable property would be recorded and kept safe.

United States v. Maier, 691 F.2d at 425. Petitioner contends that such a search was unreasonable in scope in light of his greater expectation of privacy in the locked rear compartments of the truck and in view of the particular facts of this case.

Warrantless examinations of automobiles have been upheld in circumstances under which a search of a home or office would be invalid. *South Dakota v. Opperman*, 428 U.S. at 367. The distinction rests on the principle that:

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and *it seldom serves as one's residence or as the respository of personal effects* . . . . It travels public thoroughfares where both its occupants and its contents are in plain view.

Id. at 368, *quoting Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (emphasis added). While this principle was applicable to the car in *Opperman* and justified the search of its cab and glove compartment, the same principle does not apply to the particular vehicle in the instant case and does not extend to a locked and concealed storage compartment such as that in the rear of Mr. Maier's truck.

In *United States v. Chadwick*, 433 U.S. 1 (1977), this Court distinguished the search of a locked footlocker in a car from the search of the automobile itself because the placing of personal effects in the footlocker manifested a greater expectation that the contents would remain free from public examination. 433 U.S. at 11. Like the footlocker in *Chadwick*, both rear compartments of the truck

driven by Maier were locked and the contents of the bottom compartment were concealed from outside viewing.

In *United States v. Wilson,* 636 F.2d 1161 (8th Cir. 1980), the Eighth Circuit extended *Chadwick* and held that an individual may justifiably have a greater expectation of privacy in the locked trunk of a car than in the interior of the vehicle. 636 F.2d at 1164. The Eighth Circuit found persuasive the analysis by Professor LaFave:

> The Court in *Chadwick* declared that a person's expectation of privacy in personal luggage is substantial as "luggage is intended as a repository of personal effects." But the trunk of a car is also intended as such a repository, and thus it is not apparent why, if "[b]y placing personal effects inside a double locked footlocker, respondents [in *Chadwick*] manifested an expectation that the contents would remain free from public examination," there is not the same expectation when effects are secured in the locked truck of a car. It will not suffice to point to what the Court in *Chadwick* called "the diminished expectation of privacy which surrounds the automobile," for the reasons given for that reduced expectation are inapplicable to the locked trunk—its contents are not in plain view, looking within the trunk would not "ordinarily be permissible in order to ensure the running safety of a car" and an impounded car and its contents may be adequately protected without intruding into a locked trunk.

636 F.2d at 164, *quoting* II LaFave, *Search and Seizure:* A Treatis on the Fourth Amendment, Section 7.2, pp. 540-41 (1978 and Supp. 1980). This argument applies with equal weight to the locked and concealed lower storage compartment of the truck driven by Mr. Maier. Once

Officers Rognlie and Carey looked in the window of the camper top, it was clear to them that there was a locked and concealed storage area below the plywood board which manifested an expectation that the personal effects therein would remain free from examination. Because the reasonableness of an inventory is tied to the specific areas searched, *South Dakota v. Opperman*, 428 U.S. at 376 n. 10, the analysis in *Opperman* will not lend support to a routine inventory search of the locked lower storage compartment of the truck driven by Mr. Maier.

Petitioner was entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate before his privacy interests in the contents of the locked and concealed storage area were invaded. *United States v. Chadwick*, 433 U.S. at 15-16. Moreover, while *Opperman* generally suggests that police officers may search any "windowed" compartments of a vehicle since the contents of these compartments are in plain view as the vehicle travels the streets, 428 U.S. at 368, such a principle does not apply to the camper top compartment of the truck driven by Mr. Maier. While the camper top section contained a window through which the police officers could view its contents, those contents and the circumstances surrounding their investigation provided notice to the officers that Mr. Maier possessed a greater expectation of privacy regarding this vehicle than is normally the case.

When Officers Rognlie and Carey commenced their investigation, it was two o'clock in the morning. They found Mr. Maier asleep in the truck, and the truck was pulled far off the thoroughfare. The officers established that there were no warrants out for Mr. Maier's arrest and that the truck was not stolen, and Mr Maier informed them that

the vehicle belonged to a friend but that he, Maier, had been using it for the previous five months. The truck had a "shell camper" attached in the rear, and when the officers looked through the back window, they could see sleeping bags in the camper/sleeper section. By looking through the rear window, the officers could also see that the truck had been further modified so as to create a concealed storage compartment under the sleeper section. While a motor vehicle "seldom serves as one's residence or as the repository of personal effects," *South Dakota v. Opperman*, 428 U.S. at 368, Officers Rognlie and Carey had sufficient information to realize that this truck functioned not simply as a mode of transportation, but as a temporary residence/sleeping compartment for Mr. Maier. [While Mr. Maier had been sleeping in the cab of the truck rather than the camper/sleeper portion, this simply may have been due to the weather on the night in question. The incident occurred on a night in early September, Mr. Maier was wearing only a pair of shorts and a tank top while he slept, and his feet were dangling out the open window of the cab when the police arrived (T. 5-6). Thus, Mr. Maier may have been avoiding the heat of the camper compartment on this particular night.] In this instance, the view through the rear window informed the officers that they were *not* at liberty to intrude upon this compartment of the vehicle. Under the facts and circumstances of this case, an inventory search, if appropriate at all, should have been limited to the cab of the vehicle.

Further facts of this case make the search of the locked rear compartment especially unreasonable. In *Opperman*, this Court partially justified the inventory search because "[t]he owner having left his car illegally parked for an

extended period, and thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings." 428 U.S. at 375. In *United States v. Wilson*, 636 F.2d 1161 (1980), the Eighth Circuit invalidated a search in part because:

> Wilson was present during the search and capable of making other arrangements to safeguard his property. The police could have protected their interests as well as Wilson's without intruding into the privacy of the automobile trunk. The police, for example, could have asked for Wilson's consent to search the car, or in the alternative, requested that Wilson arrange to remove the car himself or to relieve police from liability for claims. In addition, the police could have inventoried the locked trunk as a single unit.

636 F.2d at 1165. In the case at bar, the Eighth Circuit distinguished *Wilson* by emphasizing that "Maier was alone without a valid driver's license, and no responsible person available to remove the truck from the sidewalk." 691 F.2d at 424. This conclusion reflects a misconstruction of both facts and law.

The record reflects that Mr. Maier himself was an available and responsible person who could have arranged to remove the truck or relieved the police from liability for claims. While Mr. Maier disclaimed ownership of the vehicle, he indicated to the police that he had been using the truck for the previous five months. Thus, Mr. Maier asserted a credible possessory interest and was certainly available to make arrangements for the removal of the vehicle from the sidewalk.

This Court has indicated that a possessory interest in an automobile is sufficient to raise an expectation of privacy.

Rakas v. Illinois, 439 U.S. 128, 148-49 (1978); *Jones v. United States*, 362 U.S. 257 (1960). Officers Rognlie and Carey knew that the truck was not stolen, knew that there was no warrant out for Mr. Maier's arrest, and had no reason to question his possession of the truck. Under the circumstances, Mr. Maier's status was identical to that of the defendant in *Wilson* insofar as making arrangements for removal of the vehicle so as to ensure the security of its contents. *See United States v. Wilson*, 636 F.2d at 1165-66. The case at bar is indistinguishable on its facts from *Wilson*, and the district court was correct in concluding that the inventory search of the camper-truck driven by Mr. Maier was unreasonable under the Fourth Amendment.

CONCLUSION

For the reasons set forth above, this Court should declare the search of the truck driven by Petitioner violative of his constitutional rights and should reverse the judgment of the Eighth Circuit.

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